

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELISSA RHNEA PONCLEIT, a/k/a MELISSA
PHILLIPS, a/k/a MELISSA PONELEIT,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274465

Wayne Circuit Court

LC No. 06-003541-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from her sentences imposed on her jury trial convictions of false report of a felony, 750.411a(1)(b), receiving or concealing a stolen firearm, MCL 750.535b(2), and two counts of perjury in a court proceeding, MCL 750.422. The trial court sentenced defendant to 19 months to four years for the false report conviction, 19 months to ten years for the receiving or concealing conviction and to 19 months to 15 years for the perjury convictions. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from a complaint she made against her former boyfriend, Brian Long, and her later preliminary examination and trial testimony concerning this alleged assault.¹ She maintained that Long assaulted her with a handgun during an argument. Long was charged with felonious assault and possession of a firearm during the commission of a felony, but was acquitted of these charges. When the police questioned Long about the gun, he told them that he could not find it. Defendant told the police that she had hidden the gun in Long's closet, but it was later discovered in defendant's closet during a search of her home.

During defendant's initial sentencing hearing, the prosecutor argued that Offense Variable (OV) 10 (exploitation of victim vulnerability) should be scored at ten points due to defendant's relationship with Long, and the trial court agreed. The prosecutor also argued that Prior Record Variable (PRV) 6 (offender's relationship to the criminal justice system) should be

¹ Long is also the father of two of defendant's children.

scored at five points because defendant was on bond awaiting adjudication on a misdemeanor sentence at the time she committed the false felony report offense.² After a discussion as to whether defendant remained on bond when she first committed perjury during Long's preliminary examination, the prosecutor presented evidence that seemed to indicate that defendant's bond had expired prior to the testimony. The trial court scored PRV 6 at zero points. This decision placed defendant into the C II sentencing grid, a straddle cell, with a recommended minimum sentence range of 12 to 24 months. MCL 777.64. The trial court sentenced defendant to 12 months in the county jail, followed by two years of probation.

The prosecutor moved for resentencing after obtaining a copy of the District Court's register of actions and a copy of the trial transcript for Long's trial that showed that defendant's misdemeanor case was still pending at that time. Defense counsel did not argue that scoring five points for PRV 6 was inappropriate, but maintained that the prosecutor should have submitted the information during the initial sentencing, and that it was now too late to do so. The trial court found that it had relied on inaccurate information during the initial sentencing, and added five points for PRV 6. As a result, defendant's PRV score was raised to 27 points, which placed her in the D II grid. The minimum sentencing guidelines for this grid are 19 to 38 months. MCL 777.64. Defendant's minimum sentences of 19 months fell at the low end of this range.

Defendant argues that her sentences after resentencing violate the principle of proportionality and state and federal constitutional guarantees against cruel and unusual punishment under US Const, Am VIII and Const 1963, art 1, § 16.

Generally, when a sentence falls within the appropriate guidelines range, we must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). However, this Court has held that this limitation on review of sentences imposed within the guidelines range is "inapplicable to claims of constitutional error." *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Thus, we may still review defendant's claim of error.

In determining whether a sentence is "cruel and unusual," we consider whether the harshness of the penalty is proportionate to the gravity of the offense, given the goal of rehabilitation. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996).

In support of her claims that the trial court imposed disproportionate sentences and violated constitutional prohibitions against cruel and unusual punishment, defendant notes that she is a mother of three, was gainfully employed at General Motors earning \$21.04 per hour at the time of her sentencing, and had just started her employment. She also maintains that her initial sentence of jail time followed by probation "would have provided more than adequate

² MCL 777.56, which governs the scoring of PRV 6, provides in part that five points are to be scored when "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor." Long brought a domestic violence charge against defendant that was pending at the time defendant made her initial report to the police.

punishment for the then forty year old (sic) appellant who was a first time felon.” She contends that her new sentences are the result of passion and bias.

Because defendant’s sentences are within the appropriate guidelines range, they are presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Proportionate sentences do not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). Contrary to defendant’s assertion, the trial court considered defendant’s proposed reasons why it should depart downward from the guidelines. The trial court agreed with the prosecution that defendant’s employment and the fact that she had children were insufficient to support a departure. The trial court did not err when it determined that defendant’s employment history or the fact that she had children would not justify a departure. These factors do not keenly grab one’s attention so as to make this case exceptional. *Babcock*, *supra* at 257-258. Under the circumstances, we find that defendant’s argument that her sentences constitute cruel and unusual punishment is without merit.

Defendant also raises an underlying objection to the fact that the prosecutor moved for resentencing and rescoring of PRV 6. This objection is without merit. Either party may move to correct an invalid sentence. MCR 6.429(A); see also, e.g., *People v Buehler*, 477 Mich 18, 22-23; 727 NW2d 127 (2007). Defendant continues to contend that the prosecutor could not present on resentencing the evidence that defendant’s misdemeanor case was still pending at the time she testified in Long’s trial, but presents no case law or other authority to support this argument. Accordingly, defendant has abandoned this argument on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski